HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M61/2021
File Title:	Vanderstock & Anor v. The State of Victoria
Registry:	Melbourne
Document filed:	Form 27F - Plaintiffs' Outline of oral argument
Filing party:	Plaintiffs
Date filed:	14 Feb 2023

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **CHRISTOPHER VANDERSTOCK**
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE PLAINTIFFS

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PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1 An overview of the scheme of the ZLEV Act and related legislation.

- ZLEV Act, ss 3, 6, 7, 8, 10, 11, 15, 17, 58, 62 (**JBA v 1, Tab 4**);
- *Road Management Act 2004* (Vic), ss 3, 8, 17 (**JBA v 2, Tab 7**);
- *Road Safety Act 1986* (Vic), ss 3, 6, 6A, 7, 9 (**JBA v 2, Tab 8**);
- *Road Safety Vehicles Regulations 2021* (Vic), reg 23, 24, 40 and 41;

2 The current state of authority is:

2.1. the purpose of s 90 was to give the Commonwealth real control of the taxation of goods (**PS [11], [13.2]**, **[19]-[21]; Cth [10]-[11]**);

2.2. the expression "duties of customs and excise" in s 90 must be construed as exhausting the categories of taxes on goods for the purposes of the section (**PS [13.1], [23]; Cth [15], [21]**);

2.3. the distinction between a duty of customs and a duty of excise is dependent on the step taken in dealing with the goods – importation or exportation in the case of customs duties – production, manufacture, sale or distribution in the case of excise duties (**PS [13.1]**; **Cth [21]**);

- *Capital Duplicators v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 582-583, 585-587, 589-590 (majority) (**JBA v 4, Tab 17**);
- *Ha v New South Wales* (1997) 189 CLR 465 at 487-488, 491, 494-499, 503-504 (majority) (**JBA v 4, Tab 23**).

3 On the application of the principles articulated in the majority judgments in *Capital Duplicators [No 2]* and *Ha*, a tax on the consumption of goods should be held to be an excise. It should be held that an inland tax will be "upon goods" and therefore an excise for the purposes of s 90 where the "relevant step on dealing with goods" is the production, manufacture, sale, distribution or consumption of goods: **PS [44]**. Such a tax will have a "sufficient connection" with goods: **Reply [2]; Cth [3]**.

4 On the current state of authority, the exclusion of consumption taxes from s 90 is illogical and unwarranted. It was not the subject of principled development, but rather resulted from Dixon J's unwarranted deference to Canadian authority: **PS [22]-[35]**; **Cth [26]-[27]**.

- *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 at 277 (Latham CJ), 281 (Rich J), 285 (Starke J), 300-301, 304 (Dixon J) (**JBA v 5, Tab 29**);

- *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 252-253 (Rich and Williams JJ), 260-261 (Dixon J) (**JBA v 6, Tab 33**);
- *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 559 (Kitto J), 554 (Fullagar J), 594 (Windeyer J) (**JBA v 4, Tab 20**);
- *Bolton v Madsen* (1963) 110 CLR 264 at 273 (the Court) (**JBA v 3, Tab 15**);
- *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550 at 550, 560, 566, 569-570 (**JBA v 8, Tab 43**);
  - *British North America Act 1867* (Imp), ss 92, 121, 122 (**JBA v2, Tab 9**);
- *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 185 (Barwick CJ), 218-219 (Gibbs J), 230 (Stephen J), 238 (Mason J) (**JBA v 4, Tab 21**);
- *Philip Morris Ltd v Commissioner of Business Franchises* (1989) 167 CLR 399 at 467, 471 (Dawson J) (**JBA v 6, Tab 35**);
- *Capital Duplicators [No 2]* at 602 (Dawson J), 610, 628 (Toohey and Gaudron JJ) (**JBA v 4, Tab 17**);
- *Ha* at 510 (minority) (**JBA v 4, Tab 23**).

5 The ZLEV charge is imposed on the consumption (or use) of ZLEVs:

5.1. the ZLEV charge is an inland tax — it is not a fee for service or a fee for a privilege (**PS [45.1], [46]-[48]**; **Cth [43], [49]**);

5.2. the criterion of liability in s 7(1) of the ZLEV Act is the "use" of ZLEV's on specified roads irrespective of who is using the vehicle (**PS [49]-[50]**; **Cth [45]**);

5.3. the amount of the ZLEV charge is directly linked to the amount the ZLEV is used (**PS [50]; Cth [46]-[47]**);

5.4. the rate of the ZLEV charge varies depending on the type of ZLEV (**PS [50]**), and is not imposed upon motor vehicles other than ZLEVs (**Cth [48], [52]**);

5.5. the requirement of use on "specified roads" does not convert the characterisation of the tax based on its use from being other than a tax upon, in respect of or in relation to the ZLEV (**PS [51]-[61]; Reply [4]-[5]**).

6 *Dickenson's Arcade* has been displaced by *Capital Duplicators [No 2]* and *Ha*. Consistent with that position, the Court has expressly left open the question of whether a tax on the consumption of goods is an excise: **PS [14]**; **Cth [21]**. Accordingly, *Dickenson's Arcade* does not govern this case:

- *Kithock Pty Ltd v Commissioner for ACT Revenue* [2001] HCA Trans 506 at lines 541-544: **PS [42.3] fn 106**.
- *Barley Marketing Board v Norman* (1990) 171 CLR 182 at 201 (the Court) (**JBA v 3, Tab 13**).

7 If leave is required, *Dickenson's Arcade* should be re-opened and overruled. Each of the *John* factors support re-opening, as do those identified in the *Second Territory Senators Case* (1977) 139 CLR 585 at 630: **PS [38]-[43]**; **Cth [30]-[31]**; **Reply [8]-[12]**; *Wurridjal v Commonwealth* (2009) CLR 309 at [68], [71] (French CJ), [189] (Gummow and Hayne JJ) (**JBA v 7, Tab 42**).

8 *Capital Duplicators* and *Ha [No 2]* should not be re-opened: **Reply [14]**; **Cth [32]-[41]**:

8.1. Victoria requires leave to re-open a total of seven cases;

- *Capital Duplicators [No 2]* at 618 (Dawson J);
- *Ha* at 474 (Spigelman QC), 478 (Graham QC), 587 (majority).

10 8.2. Victoria seeks to do no more than reagitate the arguments that were advanced and rejected in both *Capital Duplicators* and *Ha*;

- *Capital Duplicators [No 2]* at 567-568 (Jackson QC), 570-571 (Doyle QC);
- *Ha* at 472-473 (Spigelman QC), 477 (Graham QC), 478 (Doyle QC), 477 (Keane QC), 478 (Meadows QC), 495-496, 499 (majority).

9 If re-opened, the Court should reaffirm *Capital Duplicators [No 2]* and *Ha*. The Court should reject Victoria's submission as to the meaning of excise (**VS [39]**), and any variation thereof (see **Qld [43], [65]; SA [6], [52]**):

9.1. the minority approach in *Ha* glosses over a fundamental question about the meaning of "locally produced" (*Capital Duplicators [No 2]* at 630-631 (Toohey and
20 Gaudron JJ));

9.2. the word "excise" did not have an established meaning at the time of Federation (*Matthews* at 293-299 (Dixon J));

9.3. neither the drafting history, nor the textual context, supports the view that the Constitution was framed by reference to any narrow meaning (Coper, "The High Court and Section 90 of the Constitution" (1976) 7 *Federal Law Review* 1 at 21-24);

9.4. the purpose of s 90 is not limited to the more modest purpose of protection of the integrity of the tariff policy of the Commonwealth (*Betfair v WA* (2008) 234 CLR 418 at [12]-[13] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) (**JBA v 3 Tab 14**)).

30 **Dated:** 14 February 2022

Ron Merkel **Craig Lenehan** **Frances Gordon** **Thomas Wood**